

Chapter 5

A Large-Scale Simulation, Practitioners, their Feelings and the *Verfremdungseffekt*

Jane Ching

Introduction

I first became involved in the use of simulations for learning in a litigation and advocacy context in 1994 when an innovative LLM in Advanced Litigation for practitioners, the whole first year of which was devoted to a complex litigation simulation, began at my institution. I was very new to academia then, with limited knowledge of educational theory and, if I am honest, rather scared of my students, all of whom were established practitioners and most of them considerably older than myself. This chapter is, however, in many ways, testament to what I learned from them, as well as from my colleagues who had designed the programme.

In this chapter, I describe the lengthy, comparatively free-form, face-to-face simulation used with these practitioner students and then explore a number of facets of the simulation around two themes, borrowed from Usher's description of a 'middle-class' paradigm of experiential learning, of creativity (autonomy) and confession (self-expression).¹ Opportunities for creativity are marked by the finding of space for play; making strange of the familiar and reflection in action. The confessional aspect is found in uses of reflection on action and the emotional and transformative dimensions of involvement in the project. I conclude with some reflections on usages of similar activities with early-career practitioners and suggestions for further work. It is, however, important to begin by placing the simulation activity within its regulatory and professional context.

Regulatory and Professional Context

The LLM programme was designed for mid-career or senior specialists in civil litigation and had grown out of a series of masterclasses aimed at the same constituency. Students were solicitors, barristers, legal executives and occasionally lawyers who had qualified outside England and Wales. The regulatory context was relatively light: it consisted of the hours-based, 'input' model of the domestic

1 R Usher, 'Experience, Pedagogy and Social Practices' in K Illeris (ed), *Contemporary Theories of Learning. Learning theorists in their own words* (Routledge 2009).

professions' (then) continuing professional development (CPD) frameworks, where, it can be argued, regulatory compliance is more important than learning² and, if ever tested, the output of an educational activity would have been no more than maintaining a static level of 'competence'. This kind of CPD context tends to favour a kind of educational activity far removed from simulation³ and its prevalence and (passive) convenience may even discourage involvement in other kinds of activity. 'CPD' is seen by legal professionals as a matter of attending courses which provide technical updates on developments in law and procedure, a thing divorced from 'real' learning on the job and in the workplace or reflection on and about one's practice.⁴

The reflective learning around which this simulation was designed is, of course, only one of a large number of strategies for learning from experiences,⁵ but one which is perhaps peculiarly capable of being treated as a skill that can be acquired or enhanced⁶ within a simulation context. Although the 'skill' of reflective learning has received greater prominence in structures of legal professional education in the twenty-first century⁷ –

If, as seems obvious, achieving competence should be the starting point of professional development and not the end, it is arguable that critical reflection on performance is something which should be central to professional courses.⁸

2 See CA Madden and VA Mitchell, *Professions, Standards and Competence, a Survey of Continuing Education for the Professions* (University of Bristol Department for Continuing Education 1993).

3 See M Eraut, *Developing Professional Knowledge and Competence* (Falmer 1994).

4 J Ching, 'Solicitors' CPD: Time to Change from Regulatory Stick to Regulatory Carrot?' (2011) 3 *Web Journal of Current Legal Issues* www.bailii.org/uk/other/journals/WebJCLI/2011/issue3/ching3.html accessed 22 April 2014.

5 See A Mumford, 'Four Approaches to Learning from Experience' (1995) 27(8) *Industrial and Commercial Training* 12–19; G Cheetham and G Chivers, 'How Professionals Learn in Practice: An Investigation of Informal Learning amongst People Working in Professions' (2001) 25(5) *Journal of European Industrial Training* 247.

6 For a number of students, it became apparent that reflection in and on action were techniques they already used instinctively, but had no label – or validation – for.

7 In, for example, the Legal Practice Course learning outcomes (albeit not assessed): Solicitors Regulation Authority, *Legal Practice Course Outcomes* (SRA 2011) www.sra.org.uk/students/lpc.page accessed 11 April 2014. The attribute was an assessed outcome in both the SRA and ILEX Professional Standards work-based learning pilots and subsequently in the CILEX Competency Framework: ILEX Professional Standards, *Work Based Learning Handbook* (IPS, no date) [www.cilex.org.uk/pdf/WBL%20App%20Annex%204%20\(1\).pdf](http://www.cilex.org.uk/pdf/WBL%20App%20Annex%204%20(1).pdf) accessed 11 April 2014.

8 A Boon, 'Assessing Competence to Conduct Civil Litigation: Key Tasks and Skills' in A Boon, A Halpern and K Mackie, *Skills for Legal Functions II: Representation and Advice* (Institute of Advanced Legal Studies 1992) 14.

– it is not deeply embedded to date and, at the time that this programme began, was susceptible to being dismissed as woolly, vague, insufficiently objective or demanding and ‘Californian’. In developing a degree of metacognition – in this context, awareness of one’s own learning – a considerable degree of thought was put into publicly articulating to students the philosophy of reflective learning as part of the design of the programme. The ‘expertise’ of the students, however, significantly informed the whole of the design.

Expert Students

The ‘average’ student on the programme was a solicitor, in his or her thirties and perhaps already a junior partner in a law firm. Students would therefore have the 8–10 years’ experience that is sometimes regarded as the threshold for cognitive ‘expertise’ in their field. The literature on expertise suggests a number of traits of expertise largely based around a tacit repertoire of solutions and problem-solving approaches, and an ability to see large, meaningful patterns in data and to reason more efficiently than novices can:⁹

[We] can expect experts to solve problems more quickly because less processing is required ... Experts seem able to recognise the problem quickly and retrieve a solution method from memory, while novices are left with the slower and weaker method of heuristic search for a solution ... What once required conscious thought becomes for the expert automatic, routine, and consequently much faster.¹⁰

Some discussion of cognitive expertise, however, particularly when drawn from the medical diagnosis context, assumes a ‘right answer’. Although problem-solving templates for legal diagnosis are available,¹¹ the legal and particularly the litigation context is more fluid and, in Schön’s terms, messier:¹²

9 P Benner, *From Novice to Expert* (Addison-Wesley 1984); HL Dreyfus and SE Dreyfus, *Mind over Machine* (Free Press 1986); MTH Chi, R Glaser and MJ Farr (eds), *The Nature of Expertise* (Lawrence Erlbaum 1988); KA Anders Ericsson and J Smith (eds), *Toward a General Theory of Expertise: Prospects and Limits* (CUP 1991); G Blasi, ‘What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory’ (1995) 45(3) *Journal of Legal Education* 313; HPA Boshuizen, R Bromme and H Gruber (eds), *Professional Learning: Gaps and Transitions on the Way from Novice to Expert* (Kluwer Academic Publishers 2004).

10 Blasi (n 9) 349.

11 See, for example, S Nathanson, *What Lawyers Do: A Problem-Solving Approach to Legal Practice* (Sweet & Maxwell 1997); T Anderson, D Schum and W Twining, *Analysis of Evidence* (3rd edn, CUP 2005).

12 Schön and other writers do, however, often make errors about the nature of legal practice, including that law involves right or wrong answers: DA Schön, *The Reflective*

in ... legal problems ... the initial state of affairs is imperfectly known and there is no single perfectly specified goal: these problems do not have right answers, only better or worse ones ... [P]roblems are generally large and complex, with solutions that span days, months or even years. There is only imperfect feedback about the effects of choices made along the way ... [A] litigator can assess the wisdom of a particular tactical decision only after the case is tried and decided.

There are two aspects here that are of significance for exploration in a litigation simulation for expert students: the 'better or worse' solutions and the idea that solutions can only be usefully evaluated after the event. Each student *arrived* with an expertise composed of a repertoire of tactics and of such 'better' or 'worse' options. The challenge in the design was to stimulate their creativity in generating new tactics and new possibilities, and in helping them to evaluate the adequacy not only of newly synthesized tactics and solutions but also of their existing practices. Bereiter and Scardamalia see a deliberate commitment to such working at 'the growing edge of expertise'¹³ as a defining characteristic of expertise properly so-called and to be contrasted with technical 'specialization': 'When working at the edge of their competence, the more expert people go about things in ways that result in their learning still more.'¹⁴ There is a clear demarcation, they suggest, between the aspirational expert seeking to expand and enhance his or her expertise and the reductivist specialist, using a similar repertoire of routines and solutions to make his or her life easier:

The career of the expert is one of progressively advancing on the problems constituting a field of work, whereas the career of the non-expert is one of gradually constricting the field of work so that it more closely conforms to the routines the non-expert is prepared to execute.¹⁵

Practitioner (Ashgate 1983); DA Schön, *Educating the Reflective Practitioner* (Jossey-Bass 1987); DA Schön, 'Educating the Reflective Legal Practitioner' (1995) 2 *Clinical Law Review* 231. For the legal perspective, see RK Neumann Jr, 'Donald Schön, the Reflective Practitioner and the Comparative Failures of Legal Education' (2000) 6 *Clinical Law Review* 401.

Usher (n 1) also sees 'vocationalist pedagogy' as involving 'a context where learning means proceeding to the correct answer in the most efficient way. Here adaptation and application have no room for experimentation, open-endedness or unforeseen outcomes'. Although, for a client, a 'right answer' involves a successful result at trial, one might, I suggest, distinguish between that and there being a single correct way to achieve that result. Indeed, the right result at trial is arguable if a better result might be achieved through negotiation or mediation.

¹³ C Bereiter and M Scardamalia, *Surpassing Ourselves: An Inquiry into the Nature and Implications of Expertise* (Open Court 1993) xi.

¹⁴ *ibid.*

¹⁵ *ibid.* 11.

Schön, to whom the notion of uniqueness is central, suggests, however, that in the case of a burned-out expert to whom much has subjectively become mundane (or who has become a reductivist technical specialist in Bereiter and Scardamalia's sense), reflection can re-energize:

as practice becomes more repetitive and routine ... the practitioner may miss important opportunities to think about what he is doing ... When this happens, the practitioner has 'over-learned' what he knows. A practitioner's reflection can serve as a corrective to over-learning. Through reflection, he can surface and criticize the tacit understandings that have grown up around the repetitive experiences of a specialized practice, and can make new sense of the situations of uncertainty or uniqueness which he may allow himself to experience.¹⁶

In choosing to enrol on the programme, it might be inferred that students had elected to re-energize themselves in some way. Reflection was a fundamental principle in the design of the programme.¹⁷ As reflection in action, it facilitated creativity in problem solving as part of the simulation activity. As evaluation after the event (reflection on action), it was central to the confessional activity described below and intended to broker a bridge between the simulation and enhanced practice. An additional premise, that expertise is (not only) cognitive but (also) socially situated, involving 'interactional systems that include individuals as participants interacting with others, artefacts and objects that comprise the social practice',¹⁸ is significant to understanding of both the teamworking and the reflection on action. Both permeated all aspects of the design of the simulation.

The Design

It will be apparent that, perhaps unlike some other simulations discussed in this text, the simulation around which this chapter is based was not delivered in an electronic format. The emphasis on and the effect of intensive social interaction is therefore an important part of this analysis. Social interaction is a critical element of simulation¹⁹

16 DA Schön, *Educating the Reflective Practitioner* (Jossey-Bass 1987) 61.

17 This aspect of the programme is described in J Ching, 'Reflection with Practitioner Students' (UKCLE 2010) www.ukcle.ac.uk/resources/personal-development-planning/ching44 accessed 11 April 2014.

18 S Billett, 'Knowing in Practice: Re-conceptualising Vocational Expertise' (2001) 11 *Learning and Instruction* 431, 443. See also J Lave and E Wenger, *Situated Learning: Legitimate Peripheral Participation* (CUP 1991); GJ Hofstede, L de Caluwe and V Peters, 'Why Simulation Games Work – In Search of the Active Substance: A Synthesis' (2010) 41(6) *Simulation & Gaming* 824.

19 DC Stretch, 'Simulation Design' in D Saunders and N Smalley (eds), *International Simulation and Gaming Yearbook Simulations and Games for Transition and Change Vol 8* (Routledge 2000).

and, as Hofstede et al point out, social interactions and the emotional responses that accompany them are potential risk factors: ‘factors that have to do with emotions and the social process are important both for success and for failing’.²⁰

In this programme, operational from the early 1990s, the small number of practitioner-students (typically 12–15 in each cohort) shared elements of habitus, professional context and, critically in this context, considerable understanding of the ground rules of the game: the procedures and tactics of civil litigation.²¹ Class contact for the first year of the course was in three long weekends (Thursday evening to Sunday lunchtime). After an orientation on the initial Thursday evening, the first students knew of the main activity was by way of a note delivered under their hotel doors late on Thursday night, identifying their client and asking for an urgent meeting with the lawyer early on the Friday morning. The client, it would emerge, was in the middle of a substantial disaster: in one case study, a shipwreck and chemical escape, in another, a potential disease outbreak in a heavily populated area. The litigation attracted media interest²² and was multi-party (depending on the number of teams of students that could be constructed from the cohort). It would ultimately involve a complex network of claims, counterclaims and contribution proceedings between defendants.

Thereafter, the simulation proceeded by the conventional litigation milestones: the drafting and exchange of statements of case after analysis in weekend one; directions and preparation of witness statements around weekend two; and the trial of the case in weekend three. The course team acted as referee, court office and, occasionally, procedural judge. Some breaks were provided for plenary sessions, guest lectures and the like, but teaching staff were carefully designated ‘facilitators’ rather than ‘tutors’. Although a balance had to be struck between allowing complete free-form creativity and the dictates of an award-bearing course delivered by a higher education institution (HEI), a significant level of creativity was accommodated. For example, in one cohort, a group confidently expected by the course team to be defendants spontaneously issued proceedings on their own account. Disclosure requests were occasionally met by urgent creation of new documents by the course team behind the scenes. Errors in pleading were allowed to proceed on the basis that the most effective feedback might be found in the way in which an opponent responded to the error.²³ That said, students were instructed (by their ‘clients’) not to reach any out-of-court settlement and some of the more extreme manifestations of ingenuity were gently restrained by hearings for directions as the simulation

20 Hofstede et al (n 18) 834.

21 Students from outside England and Wales were briefed, but generally appeared to find sufficient commonality in the underlying litigation processes to participate effectively.

22 Simulated by use of professionals from the industry.

23 For example, a request for further and better particulars or an application to strike out part of a pleading.

progressed.²⁴ One of the educational aims, which was emphasized throughout, was to have the students, many of whom would not have conducted trial advocacy or indeed had a case proceed all the way to trial, evaluate, after the event, the implications of steps taken at early, strategic stages for the outcome of the trial. Consequently, the trial had to take place. The compressed timetable, although representing an aspect of the artificiality of the simulation, accelerated the opportunity to evaluate after the event with the benefit of recent recollection.

Assessment in the first year was by submission of a learning portfolio (formatively assessed on a regular basis) supplemented by a terminal reflective report.²⁵ Institutional requirements for predetermined, tutor-set learning outcomes could potentially hinder such individualized learning: a solution was found in articulating, as a learning outcome, concepts of reflective practice, including an ability to be reflective, to take responsibility for one's own learning and to evaluate the concept of reflective practice itself.

Students were introduced to Schön's concept of the reflective practitioner, Kolb's learning cycle²⁶ and the Honey and Mumford taxonomy of learning styles,²⁷ as well as the Belbin material on teamwork and team profiles.²⁸ There was therefore a considerable amount of activity during the course to make the scaffolding and theoretical underpinning of the educational design explicit to students.

The mainstream literature on simulations addresses, with some concern, the use of simulations that involve or provoke conflict.²⁹ Whilst terminology is fluid,

24 A list of ground rules developed over time contained both constraints ('you cannot terminate your retainer with your client') and permissions ('you may move the furniture, you may communicate with witnesses, clients and opposing firms, you may seek directions and make interim applications'). To some extent, this was a question of giving students explicit permission to experiment and to constrain only as necessary.

25 Care should of course be taken in the assessment of reflective writing and there may be some cynicism about the authenticity of what is included when it is known that the document will be assessed. See, for example, JA Moon, *Reflection in Learning and Professional Development, Theory and Practice* (Kogan Page 1999); JA Moon, *A Handbook of Reflective and Experiential Learning: Theory and Practice* (RoutledgeFalmer 2004); D Boud, 'Relocating Reflection in the Context of Practice' in H Bradbury, N Frost, S Kilminster and M Zukas (eds), *Beyond Reflective Practice* (Routledge 2010). Nevertheless, one of the learning outcomes of the programme was designed explicitly to enable students to explore, deploy and also to evaluate, for their own practice, the concept of the reflective practitioner (here used to denote both reflection on and reflection in action). Students were invited to use both documents to explore the implications of their experiences in the course to their own practice, which raised the possibility in this context of problems of client confidentiality and of privilege in the portfolio as a document.

26 D Kolb, *Experiential Learning* (Prentice Hall 1984).

27 P Honey and A Mumford, *The Manual of Learning Styles* (Peter Honey 1986).

28 See RM Belbin, *Management Teams: Why they Succeed or Fail* (3rd edn, Butterworth Heinemann 2010).

29 K Jones, 'Damage Caused by Simulation/Games' in B Cox, D Saunders and P Saunders (eds), *International Simulation and Gaming Yearbook Research into Simulations*

at least one writer³⁰ has also argued for a clear distinction between a game, in which there is a duty to win, and a simulation, in which ‘the participants have a duty to fulfil their roles (functions, jobs) to the best of their ability, having regard to the circumstances and ethics of the real world’, and that a blurring of the two is ‘an unnecessary evil’. This presents a challenge: conflict is inherent in litigation. Litigation lawyers are employed to deal with conflict and, within an ethical context, to win.³¹ An argument that one should not, for professional litigation lawyers, simulate litigation is inapposite.³² It is part of the lawyer’s job to balance both dimensions rather than to separate them for an artificial educational purpose or to avoid risk of distress. This simulation is therefore a simulation of a game, if one conceives of the rules, tactics and strategies of litigation as a ‘game’.

Strategies for Creativity: A Place for Play

For those students who might already consider themselves to be experts in their field, simulation has the potential to open up their practice for critical re-examination of knowledge, skills and values, of process and procedure, of theories both in use and espoused, and of tacit knowledge and intuitive practice – an approach which, as I have already indicated, may be considered inherent in the concept of holistic expertise in any event.³³ But they may need to be prepared, encouraged or obliged to do so. The preceding is, of course, a loaded statement. Self-direction and critical reflection may be perceived as concomitant with adulthood,³⁴ whilst others recommend dealing with students ‘where they are’³⁵ and acknowledging

in Education Vol 5 (Routledge, 1997); K Collier, ‘Once More with Feeling – Identification, Representation and the Affective Aspects of Role-Play in Experience-Based Education’ in T Powell, J Rolfe and D Saunders (eds), *International Simulation and Gaming Yearbook: Simulations and Games for Emergency and Crisis Management Vol 6* (Routledge, 1998); P Elsmann, ‘Negative Attitudes towards Highly Experiential Role-Playing’ in Saunders and Smalley (n 19); CB Tije, ‘Conflict and Roles in Simulations’ (2002) 33(4) *Simulation and Gaming* 486.

30 Jones (n 29).

31 The very different drivers of alternative dispute resolution were addressed in the second year of the programme.

32 The point is even clearer in, for example, military education. See, for example, C Orme, ‘Professional Military Education and Simulation’ (SIMTECT 2012: Asia-Pacific Simulation and Training Conference and Exhibition, 19 June 2012) www.defence.gov.au/adc/docs/Publications2013/02_Orme%20article%20_edited%20version.pdf accessed 11 April 2014.

33 Bereiter and Scardamalia (n 13); see also Boshuizen et al (n 9).

34 SA Brookfield, *Understanding and Facilitating Adult Learning* (Jossey-Bass 1986).

35 A Rogers, *What is the Difference? A New Critique of Adult Learning and Teaching* (NIACE 2003).

their autonomy to behave as passive consumers of information, if that is what they choose. This dichotomy is also visible in Usher's exploration of assumptions, power and politicization in current models of experiential learning.³⁶ Even within this group, and in a skills-based curriculum, there might be considerable tacit pressure to behave according to comfortable theories in use and not to experiment – even under the protection of saying explicitly 'I am experimenting, I wouldn't do this normally, but I want to see what happens'.

A demand inherent in the design to be creative and to be confessional (see the discussion on reflection below) can therefore, it is argued, be disempowering.³⁷ Nevertheless, at its best, our simulation environment was capable of providing, in a concentrated form, all of the positive learning factors (challenge and value of the work, feedback support and trust, confidence and commitment/personal agency and motivation) and context factors (allocation and structuring of work, encounters and relationships with people at work, individual participation and expectations of their performance and progress) identified by Eraut and his collaborators as fostering learning in the workplace.³⁸ However, encouraging students to take the opportunity to play can be a challenge. Students identified even with their fictional clients and wanted to win; to act in the best interests of their clients. One student, indeed, invited in feedback on his or her reflective writing to consider whether, in terms of learning, it actually mattered whether his or her group won the trial was surprised, to the extent of spending much later writing in the programme meditating on the point. The familiar had been made strange with transformative effect.

Making Strange of the Familiar

The question of high and low fidelity in simulation design receives attention in the literature.³⁹ On one level, a degree of fidelity is part of the point of using a simulation at all. As Stretch defines it, 'a simulation must mirror real life and provide fidelity to the experience while controlling essential elements'.⁴⁰ If there is to be any degree of artificiality, Stretch argues, it is for the novice learner who requires a simplified environment ('the design must mirror reality only as far as the learner has the capacity to handle it').⁴¹ Fidelity is, however, not a single dimension. For example, Stretch identifies three aspects to fidelity in design in addition to overall

36 Usher (n 1).

37 *ibid*: 'An active, autonomous and productive subjectivity is brought forth in confessional practices even as it remains subject to the power-knowledge formations which bring forth this form of subjectivity and invest it with significance.'

38 M Eraut, S Steadman, F Maillardet and C Miller, 'Early Career Learning at Work' (2007) 25 *Teaching and Learning Research Briefing* 1–2.

39 See A Hale Feinstein and HM Cannon, 'Constructs of Simulation Evaluation' (2002) 33 *Simulation & Gaming*, 425.

40 Stretch (n 19) 36.

41 *ibid* 35.

complexity of the problem: content fidelity, process fidelity and context fidelity. Context fidelity is the simplest: the extent to which the environment in which the simulation is taking place reflects the ‘real’ environment. A borrowed or mocked-up courtroom, the wearing of appropriate court dress and so on can achieve this in a simple case. Content fidelity relates to the materials: does the defence look like a defence and does the witness look like the person they are representing? Process fidelity relates to the situation: ‘with novice learners, process fidelity may be limited. The degree to which a simulation matches reality depends on the experience of the participants, because the participants bring experience into their roles. A novice learner has little experience to add to the simulation’.⁴² In this chapter, I argue that design can deliberately, at least for experts, exploit both fidelity and lack of fidelity to create stimulating learning experiences. Content fidelity was, as one might expect, high (most of the time) in this simulation, both for students and for tutors.⁴³ Process fidelity was also high, given the experience of the students, except, perhaps, for those students from outside England and Wales, who had chosen to expose themselves to a double level of artificiality.⁴⁴

On another level, however, the complexity of the case and the unfamiliarity of its subject matter were deliberate challenges to fidelity. A considerable degree of familiarity with the rules of the game – the rules of civil procedure, the parameters of legal research skills and the like – was assumed. Students involved in the shipping disaster case study might have gained *some* understanding of *some* aspects of the law of the sea, but those involved in the pandemic used a case study framed around an entirely fictional piece of legislation. The extent of objective knowledge transfer was therefore limited. The extent to which the simulation was acknowledged to be a simulation was, as I have indicated, a deliberate part of the design, mixing ‘good enough’ fidelity to situate the learning in a context which students would recognize as potentially developing their own skills. Existing ‘better’ or ‘worse’ solutions in an individual’s repertoire might not have their anticipated effect and new solutions might therefore be generated:

reality is not always desirable from an educational point of view. Some simulations deliberately distort reality, or turn it on its head in order to provide a contrast to reality, or an optional reality. There are simulations set in imaginary countries, or in pre-history, or in the future, or in a fantasy world. These are not non-simulations or sub-standard simulations. Factors which help produce a

42 *ibid* 37.

43 That said, an experience where a child witness was portrayed by an adult actor led, eventually, to some questioning of assumptions about interviewing strategy once the group had tentatively said: ‘How *old* are you?’

44 In the second year, however, all students were required to ‘appear’ in a foreign tribunal.

good simulation include plausibility and consistency, not attempts to duplicate the real world.⁴⁵

The risk, in exposing experienced practitioners to a problem in their own field, even an unusually complex case dealing with an unfamiliar area of law, is that they proceed just as they do in practice, deploying theories in use and tacit knowledge, embedding habits (good and bad) and defaulting to ‘autopilot’. In order to challenge students and to provoke a standing-back and opportunities for critical reflection, a number of additional tactics were employed and made transparent to students. The fact that the subject matter of the case study was outside the students’ comfort zone and the emphasis on reflection were two components of what I will call a ‘*verfremdungseffekt*’; a word borrowed from Brechtian theatre.⁴⁶ In developing a political, ‘educational’ theatre, Brecht drew on conventions of Chinese drama in which actors perform:

in such a way that the audience was hindered from simply identifying itself with the characters in the play. Acceptance or rejection of their actions and utterances was meant to take place on a conscious plane, instead of ... in the audience’s subconscious.⁴⁷

Collier has adopted a similar device, also drawn from drama, in which she distinguishes between those parts of the activity that expect participants to identify with and become involved with the fictional experience, and those which require them to step back and ‘be aware of the artifice’.⁴⁸ The latter is intended to facilitate debrief and reflection. So, in this simulation, chronology was occasionally distorted to bring into relief the need to ‘think trial’ from the initial stages: students were asked, in the first weekend, to fast-forward to the trial of the action and to make an opening speech as a means of focusing on the later implications of early decisions.⁴⁹ Facilitators – Socratically – asked questions with the aim of uncovering uncritical exercise of theories in use. For example, a group of students in the shipping case study, debating issuing proceedings, decided without discussion to sue both the ship’s captain and his employer. When a facilitator asked why and extracted the

45 K Jones, *Simulations: A Handbook for Teachers and Trainers* (Kogan Page 1995) 11.

46 B Brecht, ‘Kurze Beschreibung einer neuen Technik der Schauspielkunst, die einen Verfremdungseffekt hervorbringt’ (1963) 3 B. Brecht: *Schriften zum Theater* 1933.

47 B Brecht, *Brecht on Theatre: The Development of an Aesthetic*, trans J Willett (Methuen 1949) 91.

48 K Collier, ‘Dramatic Changes: A New Action Model for Role-Play Practice’ in Saunders and Smalley (n 19) 52.

49 Similar devices used in this part of the programme or in the second year included having witnesses and opponents debrief publicly, including, in one activity, the use of a ‘diary room’ available to students and to a mediator to video-record their thinking and responses as the activity progressed.

response that suing both driver and employer was normal practice in road traffic cases, a more reasoned and more useful discussion took place about the tactics of choice amongst possible defendants to a claim.

Reflection in Action: The Contribution of the Team

Students were allocated into ‘firms’ of four to six students and allocated to a client for the duration of the simulation. Each weekend, one member of each team was allocated, by the course team, to be ‘senior partner’. Although students had been invited to consider their own, and their team-mates’, preferences in the Belbin schema of team roles, seniority and preference were ignored for the purposes of the allocation and a comparatively recently qualified solicitor might find himself or herself notionally in charge of a number of senior, much more experienced colleagues. The conventional hierarchy of lawyer status and deference was, then, deliberately disrupted as an aspect of the making strange of the familiar. There were two main effects of this device. First, if the ‘firm’ created some form of equality of status, where an individual would not necessarily be deferred to because of his or her seniority outside the simulation, permission was granted for all decisions to be argued out, positions and theories in use subjected to justification, and meaningful collaborative reflection in action – in Schön’s original problem-solving sense – to take place. That is, of course, a counsel of perfection, and facilitators might spend some time coaxing wallflowers and restraining the ebullient, which is why I have described it as no more than a ‘permission’. It does, however, link to the second effect: explicit consciousness of the nature of teams and teamworking, reinforced by a reference in a learning outcome. Experiences, including those that might have been more painful (such as when team members were perceived as not pulling their weight) caused some students to reflect on the configuration and effectiveness of the teams in which they worked in practice.

The Confessional

The Emotional Dimension

As I have described above, some writers see an emotional component in a simulation activity as a problem, to be designed out or deflected. Collier accommodates emotional involvement in parts of her model, but sees the need for spaces in which there is a more deliberate distancing so as to ‘avoid [students] being completely “lost” in the drama and the emotional world that it can create’.⁵⁰ This simulation bears a closer resemblance to Collier’s model, although, as I have described, whilst elements of artificiality relating to the complexity and novelty of the case and the teamworking environment were embedded into the simulation, other elements of

50 Collier, (n 48) 54.

artificiality relating to the design of the simulation itself – the explicit references to Belbin, Schön, Kolb, Honey and Mumford and others, and the distortion of chronology – involved, in Collier’s terms, ‘reflective action strategies’.⁵¹ Here ‘the artificial or representational nature of dramatic form is brought to the foreground, reminding participants that they are part of a learning process that involves both being in and out of the action’.⁵²

The discussion of teamwork above demonstrates, I suggest, that an emotional aspect cannot truly – and should not – be designed out of the experience. Students remain human beings in social interaction, and this necessarily involves their emotions and affects. In this section, however, I discuss two facets of emotional involvement, which might be present in those parts of the simulation where artificiality was not pronounced, or which might derive from the artificiality of the simulation experience itself.

The contribution to legal practice of ‘emotional labour’⁵³ has, with notable exceptions,⁵⁴ received little treatment in the literature. Emotional labour has been explored largely in the context of outward interactions, frequently with clients and the extent to which caring or comforting skills (or clinical detachment) are used or should be taught.⁵⁵ Most recently, and in the context of increased competition in the legal services sector, the internal emotional aspects of individual lawyer ‘resilience’ – apparently limited in a highly strung ‘lawyer personality’⁵⁶ – have become more prominent, to the extent of being explicitly targeted in legal professional education.⁵⁷ Emotional labour can involve not only display of real or feigned emotion, but also the socialized suppression of displays of emotion in order to maintain ‘professional detachment’.⁵⁸ Differing forms of emotional response are therefore part of the ‘game’ of litigation and a legitimate part of this kind of simulation.⁵⁹

51 *ibid* 53.

52 *ibid* 52.

53 A Hochschild, *The Managed Heart* (University of California Press 1983); M Korczynski, ‘Communities of Coping: Collective Emotional Labour in Service Work’ (2003) 10(1) *Organization* 55.

54 LC Harris, ‘The Emotional Labour of Barristers: An Exploration of Emotional Labour by Status Professionals’ (2002) 39(4) *Journal of Management Studies* 553.

55 See T Scheffer, ‘File Work, Legal Care and Professional Habitus – An Ethnographic Reflection on Different Styles of Advocacy’ (2007) 14(1) *International Journal of the Legal Profession* 57; F Bartlett and I Aitken, ‘Competence in Caring in Legal Practice’ (2009) 16(3) *International Journal of the Legal Profession* 241.

56 L Richard, ‘Herding Cats: The Lawyer Personality Revealed’ (2002) 29(11) *Report to Legal Management* 1.

57 P Vines, *Working Towards the Resilient Lawyer: Early Law School Strategies* (University of New South Wales 2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914891 accessed 11 April 2014.

58 See discussion of the uses of emotion in advocacy by barristers in Harris (n 54).

59 Simulation in other contexts has been used to explore and teach emotional self-regulation: T de Jong, J Lane and S Sharp, ‘The Efficacy of Simulation as a Pedagogy in

Usher sees the confessional aspect of simulation as potentially rendering the student vulnerable and dependent on the facilitator. My own experience suggests that reliance on the facilitator actually decreased over the three weekends, as students grew in confidence both with the simulations and the extent of the permissions given.⁶⁰ The use of permissions, as well as constraints, as part of the rules of the game may also reduce unnecessary vulnerability, reinforcing the idea that creativity and play are welcomed.

Of course, whether from being caught up in the simulation, from necessary emotional labour or as an inevitable component of the social interaction, there was emotion. Students experienced anger and frustration (with other students, with staff, with themselves and with the situation) and occasional personal distress (where, for example, students had a fear of advocacy performance). Students also, it should not be overlooked, experienced positive emotion: motivation and pleasure (particularly when succeeding in a challenging activity, such as the advocacy at the trial). Although an emotional component in reflection on action has long been acknowledged,⁶¹ deliberate attention to emotional debrief from real-life critical incidents appears most developed in medicine, particularly in nursing.⁶² It is clearly humane and necessary to find mechanisms to allow, for example, a young student nurse to address his or her first experience of a patient's death. Even lawyers, particularly those in the personal plight sector, encounter client death by illness, accident or suicide, and clients who are deported to uncertain futures or who are imprisoned, rendered homeless or declared bankrupt. An introduction to supported reflection on action in the context of simulation creates the opportunity, sadly all too rare in legal education, for personal exploration of this emotional dimension⁶³ as part of the space made available in the simulation for critical and professional 'play', provided that facilitators and students could engender a level of trust. The reflective writing permitted such an emotional as well as an intellectual outlet (guaranteed to be read by a member of the course team). Although the extent of filtering cannot be estimated, the degree of rawness in some cases suggests that – in this comparative privacy – only limited filtering was taking place.⁶⁴ This aspect provided not only part of the debrief which is critical

Facilitating Pre-Service Teachers' Learning about Emotional Self-Regulation and its Relevance to the Teaching Profession' (2012) 37(3) Australian Journal of Teacher Education 4.

60 I characterized this as moving from a parental role in the first weekend to being relegated to research assistant and photocopying clerk during the trial.

61 D Boud, R Keogh and D Walker, *Reflection: Turning Experience into Learning* (Kogan Page, 1985).

62 G Bolton, *Reflective Practice: Writing and Professional Development* (Paul Chapman Publishing 2001).

63 See, for example, Boud et al (n 61); K Illeris, *The Three Dimensions of Learning: Contemporary Learning Theory in the Tension Field between the Cognitive, the Emotional and the Social* (2nd edn, NIACE 2004); both texts by Moon (n 25).

64 In a very few cases, problems which might have been cultural (issues of 'face') or cognitive (students who were unable to transfer from the classroom to the workplace)

to any simulation, but also facilitated students in making the link and the transfer of techniques and conclusions into their own personal workplace and practice. Some students explored, in varying depths, their own responses to the concept of reflective learning itself, sometimes from a high degree of (initial and occasionally continuing) scepticism.

The contribution of emotion to reflection and to learning has become of greater prominence in recent years, although as late as 2007, Brockbank and McGill found the emotional dimension of reflection to be absent or distrusted in the academy.⁶⁵ Moon suggests that emotion might be a part of the process of reflection,⁶⁶ the content or object of a reflective process (as when a strong emotional response prompts reflection), or as suggested by Boud et al, a promoter or inhibitor of the process of reflection even where the crisis or dilemma is not present:

Negative feelings, particularly about oneself, can form major barriers towards learning. They can distort perceptions, lead to false interpretations of events and can undermine the will to persist. Positive feelings and emotions can greatly enhance the learning process, they can keep the learner on the task and can provide a stimulus for new learning.⁶⁷

Reflection and Transformative Learning

However useful the simulation in terms of practicum, however challenging in degree of complexity and artificiality, and however liberating in terms of emotional engagement, the overall objective was to make a difference to an individual's practice. This need not necessarily mean changing the individual's practice; in some cases what was learned was a confidence that existing practices were competent, or that they incorporated elements of 'best practice' and could be added to a wider repertoire of strategies. There had, however, to be a bridge between the simulation and the individual's practice in which learning became individualized. Although, as Brockbank and McGill have pointed out, concepts of 'reflection' vary enormously, I have in this chapter distinguished between reflection in action as a problem-solving technique and reflection on action as an approach to learning. The former was undoubtedly present and was fostered by the need to articulate and justify decisions made within the 'firm'. The latter was an individual exercise, although informed by feedback and debrief during the classroom exercises. Both permitted students to engage in what Argyris and Schön have referred to as 'double-loop learning': holding assumptions, tacitly informed

were encountered.

⁶⁵ A Brockbank and I McGill, *Facilitating Reflective Learning in Higher Education* (SRHE and Open University Press 2007).

⁶⁶ Moon, *Reflection in Learning and Professional Development, Theory and Practice* (n 25) 95.

⁶⁷ Boud et al (n 61) 11.

practices and theories in use up to the light for critical examination.⁶⁸ Given their expertise and length of experience, this was significant and, in some cases, led to unexpected results, which might not be detached from the emotional commitment involved in the activity either as a trigger or as a result:

Anomalies and dilemmas of which old ways of knowing cannot make sense become catalysts or ‘trigger events’ that precipitate critical reflection and transformation.⁶⁹

If a sudden event or the kind of cognitive processes that have earlier been referred to as reflection, meta-learning or transformative learning cause a radical reconstruction of the individual’s comprehension of certain set conditions and contexts, there may be a corresponding radical shift in the emotional patterns.⁷⁰

Students were therefore encouraged to develop skills in critical reflection: oriented to the future, involving implications for subsequent practice and Moon’s phases of working with meaning and the transformative learning detected by Mezirow:⁷¹

Uncritically assimilated meaning perspectives, which determine what, how and why we learn, may be transformed through critical reflection. Reflection on one’s own premises can lead to transformative learning.

... Transformative learning involves a particular function of reflection: reassessing the presuppositions on which our beliefs are based and acting on insights derived from the transformed meaning perspective that results from such reassessments.⁷²

Here, of course, the students’ prior experience was fundamental. If there is no ‘old way of knowing’ or performing to come into conflict with what is now presented, there is, for Mezirow, no prompt for reflection to take place. Even where there is prior experience, it would, of course, be possible for the individual to choose to retain his or her existing practice and his or her old way of knowing. Alternatively, the result of the reflection may be an addition which does not disrupt the existing store of knowledge or repertoire of skills. Nevertheless, Mezirow does not see transformative learning as lying in the act of reflection alone, but as part of

⁶⁸ C Argyris and DA Schön, *Theory in Practice: Increasing Professional Effectiveness* (Jossey-Bass 1974).

⁶⁹ J Mezirow et al, *Fostering Critical Reflection in Adulthood* (Jossey-Bass 1990) 14. See also J Mezirow, ‘An Overview on Transformative Learning’ in Illeris (n 1).

⁷⁰ Illeris (n 63) 74.

⁷¹ Transformative learning involves a dramatic shift in perception or understanding, in Mezirow’s terms, usually prompted by a cognitive dilemma or crisis of some kind.

⁷² Mezirow et al (n 69) 18.

the Kolb cycle to which taking action as a result of reflection is key. Here, the invitation to students to explore what they had taken from the simulation in their own real-world context was vital. In considering what they could adopt, adapt or improve (or, of course, reject) into their own practice, the opportunity arose for autonomy and ownership to be asserted:

reflective discourse and its resulting insight alone do not make for transformative learning. Acting upon these emancipatory insights, a praxis, is also necessary ... The learner must have the will to act upon his or her new convictions.⁷³

These questions of prior experience and the opportunity for praxis, however, have implications when using this kind of material with less experienced students.

Simulations and 'Non-expert' Students

Institutional and academic learning from this course was later deployed in similar programmes designed for early career solicitors. To some extent, this was a question of how the material was handled: one activity from a different part of the LLM programme was successfully used, with varying degrees of didactic 'teaching' on the Legal Practice Course,⁷⁴ as well as with junior solicitors. However, for a number of reasons, there was a greater degree of more directive teaching involved with the younger students. There was, for example, a need to introduce students to some elements of practice or procedure that might be entirely new to them, so as to reinforce the rules of the game that we could assume the older practitioners already understood or at least had had experience of.

The younger practitioners were frequently very differently situated in their workplace. The simulation activity might deliberately or otherwise represent their only experience of a particular task or, more commonly, of a case proceeding all the way to trial. The fact that students had, prior to qualification, at least two years of working experience in legal practice through their mandatory training contract⁷⁵ did not necessarily assist them. Regulation of the training contract requires trainees to experience at least three different areas of law and both contentious and non-contentious work, with the result that their litigation experience might have been very short. Possibly because there is no requirement that a trainee be retained as a newly qualified solicitor on completion of the training contract, there is the

⁷³ Mezirow (n 69) 354.

⁷⁴ The programme undertaken after completion of the undergraduate law degree or its equivalent by intending solicitors in England and Wales.

⁷⁵ A period of employment required as a precursor to qualification as a solicitor in England and Wales.

potential for a disjunct between the kind of tasks allocated to trainees possibly regarded as temporary employees and those allocated to the newly qualified.⁷⁶

Activities might be intended to stretch, in the 'safe' simulation context, marginally beyond the tasks students actually carried out in practice,⁷⁷ or to allow them to see the implications of tasks that they might undertake (the effects, in trial, of a witness statement that might have been taken by a junior solicitor, for example). Students might have no autonomy, on returning to the office, to change their working practices or to engage in experimental praxis as a result of reflection on action. This led to a practical issue, but also to a more complex problem that was much more difficult to address.

The practical problem was one of completing the Kolb cycle, of not only identifying a goal in enhanced practice but also of finding the means to achieve it, particularly where the student might be seeking to reflect on and synthesize from a single simulated experience. Students might be very good at evaluative reflection ('that went horribly wrong!'), which is backward-looking and involves evaluation of strengths and weaknesses of performance. It might, therefore, be seen as, *inter alia*, remedial and confidence building and, in Moon's terms, as 'surface', leading towards the transitional phase of 'making meaning' rather than necessarily enhancing quality of performance in the future or being transformative.⁷⁸

Not yet secure in a repertoire of strategies, novices may tend to seek, with some desperation, a single 'right answer' and not yet be ready for the messiness of full professional practice or suggestions that there are alternative means to achieving similar results.⁷⁹ Their solutions may be more superficial⁸⁰ and also more inflexible. Ropo, for example, found expert teachers adapted their original lesson plans to suit the situation, whereas novices stuck more rigidly to their plans (the 'rules' approach described by Benner of those at the Dreyfus 'novice' stage). Experts 'seemed to have deeper knowledge of the students and classroom problems than novices or postulants'.⁸¹ Lesgold et al suggest that experts treat their cognitive

76 Lave and Wenger (n 18) describe effective apprenticeship as involving a trajectory of 'legitimate peripheral participation', forming a smooth sequence from entry to competent and autonomous practice. What may be a dramatic shift in expectations and responsibilities visited on a newly qualified solicitor on qualification disrupts this sequence.

77 Vygotsky describes a stretching 'zone of proximal development', where novices work with expert supervision on the fringes of the novices' own competence so as to extend it. See LS Vygotsky, *Mind in Society: The Development of Higher Psychological Processes* (Harvard University Press 1978).

78 Moon, *Reflection in Learning and Professional Development, Theory and Practice* (n 25).116 suggests a rising series of stages, from noticing and making sense, through making meaning (the tipping point between surface and deep learning) to working with meaning and transformative learning.

79 Benner (n 9); Dreyfus and Dreyfus (n 9).

80 See Blasi (n 9).

81 E Ropo, 'Workplace and Organisation: Enculturation to Become an Expert Professional Teaching Expertise' in Boshuizen et al (n 9) 159.

patterns with less absoluteness than do novices: ‘the situation in experts, in which tentative schemata are held as tentative until rigorously tested, [compared with] the situation of the true novice, whose schemata are tightly bound to the purely perceptual’, that is, the inflexibility and ‘guidance’ focus of the Dreyfus novice.⁸²

Consequently, an invitation to be creative within the rules of the game when the individual is not necessarily secure about the rules of the game is potentially threatening and might be perceived as an invitation to reveal incompetence. An invitation to try out new ideas in practice may be thwarted by the lack of autonomy of a newly qualified lawyer working in a large team to predetermined processes, or may disrupt fragile confidence and competence (‘I thought I was doing it right: now you tell me there is another way of doing it!’). These issues can at least be addressed by careful work with facilitators and mentors in the workplace, who can confer credibility on alternative solutions and creative ideas, as well as working with the student to identify steps that could realistically be taken to achieve goals resulting from reflective activity. Indeed, some of the younger lawyers, suitably supported in this way, later produced documents and systems that were adopted by their work teams and organizations.

There is a complex matrix of variables at play here about work situation, background and personal motivation,⁸³ which vary between organizations, between students and over time. The more intractable issue was that, still in the transitional years from traineeship to entitlement to independent practice, younger lawyers are often in a liminal stage not only of professional practice but also of personal professional identity.⁸⁴ Skills of reflection are not yet fully supported or embedded in initial vocational education, still less in conventional, hours-based, CPD:

new practitioners may not initially have the experience and knowledge to draw on as material to facilitate the process of critical reflection ... there is the need to specifically focus on critical reflection and a broader knowledge base at the higher stages of undergraduate education and during postgraduate education (in terms of both formal qualifications and CPD). This challenges the ‘technical update’ orientation of CPD adopted by many professional groups which tends to

82 A Lesgold, H Rubinson, P Feltovich, R Glaser, D Klopfer and Y Wang, ‘Expertise in a Complex Skill: Diagnosing X-Ray Pictures’ in Chi, Glaser and Farr (n 9) 338.

83 There is a risk, for instance, that any attempt to cover a topic that is also covered on the LPC, even if in a different context or with a greater degree of autonomy or complexity, was perceived as going over old ground or, worse, as remedial.

84 See, for example, JE Wallace, ‘Work Commitment in the Legal Profession: A Study of Baby Boomers and Generation Xers’ (2006) 13(2) *International Journal of the Legal Profession* 137; H Sommerlad, ‘Researching and Theorizing the Processes of Professional Identity Formation’ (2007) 34(2) *Journal of Law and Society* 190.

keep speciality areas 'up-to-date' with new procedures and equipment advances, maintaining an even narrower focus than undergraduate education.⁸⁵

There is a place for play, as a – remedial – practicum for tasks which they may not undertake, or be allowed to undertake, in the workplace. These may be as simple as client contact and can be designed around the factors identified by Eraut et al⁸⁶ as common to workplaces, as effective learning environments. They may involve exploring the implications, in the wider scale of the case as a whole, of those tasks that the newly qualified are allowed to undertake. Reflection requires support before it can be effectively critical and forward-looking, and there is a need for understanding of the complexities of novitiate, identity, confidence and security that may be at work.⁸⁷

Implications

I have argued that, at least with more experienced students, there is merit in exposing the scaffolding of one's simulation and educational design, and that an element of deliberate artificiality is productive in challenging students to reflect critically and to transform their practice. Despite this element of artificiality, however, there is an emotional component which is necessarily present and can be harnessed to good effect, but which must be accommodated. There is more difficulty in negotiating this level of design with early career students, who have limited experience and limited autonomy to change what they do in their workplace, and who may be, emotionally and personally, tender about their own confidence, competence and professional identity. Indeed, the implications of use of simulation learning with early career legal professionals of the learning of early career legal professions per se is under-explored at present. As practice changes, and preceding vocational and other education ceases to be able to prepare individuals on any meaningful one-size-fits-all basis (if it ever could) for very specialist or very volatile areas of legal services, the role of simulation in addressing this gap may become potentially more significant and increasingly prevalent.

⁸⁵ J Yelder, 'An Integrated Model of Professional Expertise and its Implications for Higher Education' (2004) 23(1) *International Journal of Lifelong Education* 60, 76–77.

⁸⁶ Eraut et al (n 38).

⁸⁷ There is some evidence that in the early phases of exposure to the workplace or in transition between different learning environments, there is regression: the confident, secure, creative, reflective undergraduate need not retain those traits in the very different context of the working environment. See Boshuizen et al (n 9); S Hallam, 'Transitions and the Development of Expertise' (2010) 16(2) *Psychology Teaching Review* 3.